

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>DALEN WELSH</b>	)	
Claimant	)	
V.	)	
	)	
<b>MATT FOLTZ CONSTRUCTION</b>	)	
Respondent	)	Docket No. 1,064,767
AND	)	
	)	
<b>FARM BUREAU PROPERTY AND</b>	)	
<b>CASUALTY INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Both parties appealed the April 8, 2015, Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on August 4, 2015, in Pittsburg, Kansas.

**APPEARANCES**

Bruce Alan Brumley of Topeka, Kansas, appeared for claimant. Matthew S. Crowley of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties stipulated: (1) the preliminary hearing transcript is part of the record, but not the exhibits thereto; (2) claimant's October 31, 2013, deposition transcript is part of the record; (3) claimant sustained a 34 percent right upper extremity functional impairment and (4) the Board may consult the *Guides*.<sup>1</sup> Respondent agreed

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted. The parties cannot cite the *Guides* without the *Guides* having been placed into evidence. *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 334-35, 945 P.2d 8, *rev. denied* 263 Kan. 885 (1997). The Board has ruled against exploring and discussing the *Guides*, other than using the Combined Values Chart, unless the relevant sections of the *Guides* were placed into evidence. E.g., *Billionis v. Superior Industries*, No. 1,037,974, 2011 WL 4961951

claimant's accident was the prevailing factor causing his psychological injury. If the Board awards claimant a work disability, respondent does not dispute the percentage of work disability awarded by the ALJ. Both parties agreed the ALJ's calculation of the award was incorrect. On August 12, 2015, the parties filed a stipulation that claimant was overpaid \$1,795.90 in temporary total disability benefits (TTD).

### ISSUES

ALJ Avery determined that as a result of claimant's August 3, 2012, accidental injuries: (1) claimant sustained a 34 percent right upper extremity functional impairment, which converted to a 20 percent whole person functional impairment, and a 12.5 percent whole person functional impairment for a psychological injury, which combined for a 30 percent whole person functional impairment; (2) claimant sustained a 53.35 percent work disability from November 18, 2013, through August 31, 2014, and a 50 percent work disability thereafter; (3) respondent is entitled to a credit for the overpayment of two days of TTD; and (4) claimant is not entitled to apply for future medical benefits.

Respondent contends claimant did not prove he sustained a permanent psychological impairment. Respondent submits claimant's award is limited to a 34 percent impairment to the right arm. Respondent asks the Board to find the psychological impairment testimony and opinions of Dr. James R. Eyman inadmissible because it was an unfair and prejudicial surprise. Respondent requests the denial of future medical benefits be affirmed.

Claimant asserts he proved he sustained a permanent psychological impairment. He requests the Board increase his psychological impairment to a 15 percent whole person functional impairment. Claimant requests the Board affirm the ALJ's findings regarding work disability and requests future medical benefits.

The issues are:

1. Are Dr. James R. Eyman's testimony and opinions concerning claimant's psychological impairment admissible?
2. What is the nature and extent of claimant's disability?
3. Is claimant entitled to apply for future medical benefits?

**FINDINGS OF FACT**

On August 3, 2012, claimant, a carpenter for respondent, slipped while working on a roof, slid down the roof, fell to the ground and landed on his right arm. Claimant, who is right handed, broke his right arm and the bone was sticking out of his arm. He also cut the tendons in his right index finger. On August 3, claimant's right index finger laceration was repaired and on August 6, his right elbow radial head was replaced and a metal plate was put in his arm.

Dr. Brian J. Divelbiss first saw claimant in January 2013. In April 2013, the doctor removed hardware from claimant's right ulna and prescribed physical therapy. Dr. Divelbiss indicated claimant reached maximum medical improvement (MMI) on June 12, 2013, and would not need future medical treatment. The doctor's work restrictions were: lifting no more than 60 pounds to waist level, lifting no more than 35 pounds above shoulder level and pushing or pulling no more than 85 pounds. Dr. Divelbiss opined claimant could no longer perform five of nine job tasks identified by vocational expert Dick Santner for a 56 percent task loss.

Claimant never returned to work as a carpenter and since November 18, 2013, has been a salesman for a farm dealership in Greeley, Kansas. The parties stipulated claimant's post-injury wage from November 18, 2013, through August 31, 2014, was \$571.06 per week and \$624 per week beginning September 1, 2014.

At the request of his attorney, claimant was evaluated by Dr. Daniel D. Zimmerman on May 11, 2014. Dr. Zimmerman indicated claimant sustained a right elbow fracture-dislocation, a right index finger laceration and right third digit injury and was at MMI. The doctor opined it was more probably true than not claimant would need additional medical treatment in the future, including the use of a nonsteroidal anti-inflammatory medication such as Celebrex or Mobic, which should be monitored by a physician. Dr. Zimmerman testified claimant might need a re-repair of the fascial defect in the right upper extremity at the site from which the hardware was removed.

Dr. Zimmerman, for claimant's right arm, restricted him to lifting no more than 50 pounds occasionally, lifting no more than 25 pounds frequently and avoid frequent flexion, extension, twisting, torquing, pulling, pushing, hammering, handling, holding and reaching. The doctor also noted claimant was limited in his ability to use his right thumb, second and third digits to perform dexterous digital functions due to range of motion limitations, pain and discomfort. Dr. Zimmerman opined claimant could no longer perform nine of nine job tasks for a 100 percent task loss.

Claimant testified that sometime after his accident, he began having problems sleeping because of his injuries and concern over finances and what he was going to do for work. Claimant, at the request of his counsel, was evaluated by psychologist R. E. Schulman, Ph.D., on April 8, 2013. Dr. Schulman opined claimant suffered from

depression, adjustment difficulties and loss of self-esteem and the prevailing factor causing those conditions was his work injury. Dr. Schulman recommended behavioral counseling. Dr. Schulman discussed with claimant the use of medication for depression, but claimant declined. Claimant filed an application for preliminary hearing requesting psychological treatment.

Respondent had claimant evaluated by psychologist Patrick D. Caffrey, Ph.D. on July 9, 2013, which included extensive psychological testing and an interview. Dr. Caffrey diagnosed claimant with adjustment disorder with depressed mood and opined claimant's work accident was the prevailing factor causing his psychological condition. Dr. Caffrey opined claimant did not need psychological treatment because his condition was mild and he appeared to be functioning well.

Following an August 9, 2013, preliminary hearing, the ALJ appointed psychologist James R. Eyman, Ph.D., to evaluate claimant. Dr. Eyman met with claimant twice in September 2013 and opined claimant suffered from an adjustment disorder with depressed mood that was directly attributable to his work accident. Dr. Eyman recommended psychotherapy.

The ALJ issued an October 9, 2013, Order appointing Dr. Eyman to provide psychological treatment until claimant reached MMI. From November 7, 2013, through January 22, 2014, when Dr. Eyman felt claimant reached MMI, Dr. Eyman saw claimant six times and claimant missed two appointments.

At Dr. Eyman's deposition, claimant's attorney indicated he had sent Dr. Eyman a copy of the regular hearing transcript to review for possibly providing an impairment rating. Dr. Eyman did not prepare a second report, but his treatment notes were placed into evidence. Respondent objected to Dr. Eyman providing an impairment rating because claimant had not provided a report from Dr. Eyman prior to the deposition and respondent asserted it was an unfair surprise. At oral argument, respondent objected to Dr. Eyman providing a permanent impairment opinion. Respondent argued it did not know until Dr. Eyman's deposition that he was opining claimant had a mild impairment of concentration and, therefore, respondent had insufficient time to prepare for cross-examination.

The *Guides* has a table entitled "Classification of Impairments Due to Mental and Behavioral Disorders." Dr. Eyman explained the table has four areas or aspects of functioning and each area is rated according to five classes ranging from no impairment to extreme impairment. Dr. Eyman testified concerning the class of impairment claimant sustained in each category:

- |   |                            |                 |
|---|----------------------------|-----------------|
| • | Activities of Daily Living | No Impairment   |
| • | Social Functioning         | No Impairment   |
| • | Concentration              | Mild Impairment |
| • | Adaptation                 | No Impairment   |

Dr. Eyman attributed claimant's lack of concentration due to his difficulty sleeping. Dr. Eyman indicated the *Guides* does not provide percentages for psychological impairments, so he used the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2nd ed.), which provides a 10 percent to 20 percent functional impairment for claimant's mild impairment in concentration. Dr. Eyman then opined claimant had a 10 percent psychological impairment and his accident was the prevailing factor for his psychological impairment.

Dr. Eyman acknowledged that on January 22, 2014, the date of claimant's last visit, claimant stated he was no longer depressed. However, the psychologist testified he was concerned that claimant was minimizing his depression. Dr. Eyman indicated claimant was at MMI, or stated alternatively, his adjustment disorder with depressed mood was in remission. The psychologist placed no permanent restrictions on claimant.

Claimant testified he thinks about the accident once a week and will not go on a high roof, but prior to the accident had no problem with heights. Claimant indicated his accident affects him every day in everything he does. He testified he was good at being a carpenter and misses it. When asked if he liked being a salesman, claimant indicated he did not enjoy the public all the time.

Prior to his accident, claimant enjoyed hunting, fishing, boating, skiing, softball and cutting wood. He also coached high school wrestling for three years and competitively team roped with his brother. He can no longer throw a softball because of his right arm injury and does not competitively rope. He gets frustrated because he cannot water ski and do other activities he used to do all the time and does not know as much as other salesmen. He cannot rotate his right hand over unless he turns his body, which prevents him from using his right hand to receive change. He now eats using primarily his left hand. He no longer lifts weights, but did so about five days a week before his accident.

According to claimant, prior to psychotherapy sessions with Dr. Eyman:

... I wouldn't sleep at night. My head was constantly running what I was going to do for work. My hand would go numb in the middle of the night constant. They sent me back to get it checked out and they didn't know -- really didn't have an answer, so that would wake me up a lot, then I would stress about money or sleeping mainly, not being able to sleep.<sup>2</sup>

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<sup>2</sup> R.H. Trans. at 17-18.

Claimant denied telling Dr. Eyman in January 2014 he was no longer depressed, but did tell Dr. Eyman the therapy sessions were interfering with work.

At the request of his counsel, claimant was evaluated by psychologist James O. Jackson, Ph.D., on January 22, 2015. Dr. Jackson interviewed claimant, conducted numerous tests and reviewed the reports of Drs. Eyman, Schulman and Caffrey, claimant's regular hearing testimony and Dr. Eyman's testimony. Dr. Jackson diagnosed claimant with somatic symptom disorder with mild, persistent pain. Claimant's symptoms of somatic symptom disorder included headaches, a high level of muscle tension, sleep disturbance and his level of general emotional distress. Dr. Jackson explained somatic symptom disorder:

. . . is a disorder where Mr. Welsh, when he -- there's a psychological component to his pain. He tends to when he -- when he experiences pain he -- his autonomic nervous system becomes more wound up. The more activity, the more distressed. And he will -- tends to convert that emotional distress into the experience of psychological symptoms. . . .<sup>3</sup>

Dr. Jackson noted claimant was diagnosed by three psychologists with adjustment disorder with depressed mood, but that it was within normal limits when he evaluated claimant. The psychologist opined claimant's accident was the prevailing factor for the psychological condition he diagnosed and that claimant had reached maximum psychological improvement. Dr. Jackson testified claimant has difficulties with some activities of daily living and represses mental and emotional stress resulting from physical complaints.

Dr. Jackson, using the table at page 301 of the *Guides*, determined claimant's impairment in four categories:

• Activities of Daily Living	Mild Impairment
• Social Functioning	Mild Impairment
• Concentration	Mild Impairment
• Adaptation	Moderate Impairment

According to Dr. Jackson, claimant had no impairment in any of the four categories prior to his accident. Dr. Jackson indicated claimant was mildly impaired in social functioning because he perceived he should get married, but could not due to lack of finances, which was caused by his accident. Another reason for the mild impairment finding was that claimant no longer had an outlet for his competitiveness, because claimant no longer held a physical job and no longer lifted weights. The psychologist also indicated there was a situation where claimant became upset at his boss and "blew up."

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<sup>3</sup> Jackson Depo. at 18-19.

Dr. Jackson indicated claimant's activities of daily living are mildly impaired. Claimant reported pain was constant in his life, he has limited range of motion and has not figured out how to sleep with his injury and wakes due to pain and numbness. Dr. Jackson agreed claimant is self-sufficient in his ability to carry out the functions of daily living. Claimant has a mild impairment of concentration because he spends a lot of time thinking about his body and about his ability to be comfortable with who he is.

When asked why he felt claimant was moderately impaired in the adaptation category, Dr. Jackson testified: "I think that change, purely on a psychological basis, is very, very difficult and I think adapting is going to be very, very difficult. And I think he's . . . really tight -- not a lot of flexibility in his adjustment for comfort."<sup>4</sup>

When asked how claimant's injury might affect him psychologically, Dr. Jackson testified:

Oh, I think it . . . forms him. I think it's devastating and I think he has to sort of redefine and reintegrate . . . . He has to almost completely reintegrate himself with regard to his life in terms of who he is as a person.<sup>5</sup>

Dr. Jackson indicated the *Guides* does not allow for percentages when rating psychological disorders. Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2nd ed.), Dr. Jackson determined claimant was in the 10 percent to 20 percent range for mild impairment. Dr. Jackson assigned what he termed a conservative 15 percent functional impairment. Dr. Jackson recommended skills-focused counseling for claimant to teach him techniques to develop a relaxation response. With regard to his usage of the *Guides*, Dr. Jackson testified:

Q. Okay. So to sum up, as I understand you correctly, you've presented the evaluation and your testimony here today based upon the criteria in the Fourth Edition and then used the ranges of impairments under the Second Edition, which is indicated in the Fourth Edition, to determine any rating for Mr. Welsh?

A. Yes, in my interpretation of mild that I discussed earlier.<sup>6</sup>

Dr. Jackson felt claimant would push himself past the limits of his ability on a daily basis, which will lead to more anxiety and more muscle bracing, which will lower his pain threshold and increase his pain experience at the same time; develop physical problems

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<sup>4</sup> *Id.* at 70.

<sup>5</sup> *Id.* at 93.

<sup>6</sup> *Id.* at 72.

such as headaches and a sore neck that he will worry about; and should avoid working at a height more than four or five feet.

According to Dr. Jackson, he has testified five to eight previous times in workers compensation cases. He has read the 2nd, 4th, 5th and 6th editions of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* and went to a seminar on changes contained in the 6th edition and the evolution of the *Guides to the Evaluation of Permanent Impairment*, but does not consider himself an expert.

Dr. Schulman testified he met with claimant only one time, on April 8, 2013, and did not review any of claimant's medical or psychological records before dictating his report. Nor did the psychologist administer any psychological tests. Dr. Schulman indicated claimant reported having concentration and focus difficulties since high school. Dr. Schulman's diagnosis was adjustment disorder with depressed mood. Using the global assessment of functioning, Dr. Schulman assigned claimant a score of 60. According to Dr. Schulman, a score of 61 through 70 is for mild symptoms and 60 is in the moderate range. However, Dr. Schulman felt claimant fell in the mild range. Dr. Schulman opined claimant's work injury was the prevailing factor for his diagnosed condition.

At the request of claimant's attorney, Dr. Schulman reviewed portions of claimant's regular hearing testimony and opined claimant's self-esteem and self-confidence were affected when he could no longer perform carpentry work. Dr. Schulman indicated that if claimant becomes successful at another career and as a result, has self-esteem and feels good about himself, a lot of his difficulties should disappear.

Without seeing claimant again, Dr. Caffrey testified claimant had mild depression, did not require treatment and was not permanently impaired. Dr. Caffrey indicated adjustment disorder with depressed mood is a reactive-type depression that does not necessarily result in a permanent psychological impairment and responds well to treatment.

According to Dr. Caffrey, when he evaluated claimant in July 2013, claimant had average scores for tests requiring mental manipulation, concentration, attention, short- and long-term memory and mental alertness, which suggested claimant had no impairment for concentration.

Dr. Caffrey indicated that when claimant reached MMI on January 22, 2014, his adjustment disorder with depressed mood was in remission. Dr. Caffrey reviewed Dr. Jackson's report and disagreed with Dr. Jackson's diagnosis of somatic symptom disorder. Dr. Caffrey indicated Minnesota Multiphasic Personality Inventory (MMPI) testing he conducted did not show claimant had somatic symptom disorder.

Claimant's attorney proffered claimant testified he missed working as a carpenter and does not always enjoy being a salesman and then asked if those concerns would be



relevant in ascertaining if someone has a psychological disorder or impairment. Dr. Caffrey answered affirmatively, but testified that a person may have unpleasant problems, but may be able to function adequately, so it does not rise to the level that is disabling.

At the regular hearing, the ALJ inquired:

So the issues then before the Court would be nature and extent, future and unauthorized medical care, the amount of temporary total disability due the Claimant. In addition, the Respondent has notified the Court that it is denying that the Claimant suffered a psychological injury as a result of the -- this accidental injury, although the case in chief is compensable. Will there be any additions, modifications or corrections to that record?<sup>7</sup>

Claimant indicated there were no corrections. Respondent replied it was admitting claimant sustained a right upper extremity injury only, was denying claimant's psychological claim, including the cost of the court-ordered independent medical evaluation and Dr. Eyman's treatment, and the only other issue was overpayment of TTD. Respondent's final terminal date was extended to March 24, 2015.

#### **PRINCIPLES OF LAW AND ANALYSIS**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>8</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."<sup>9</sup>

In *Love*,<sup>10</sup> the Kansas Court of Appeals established the requirements for proving a psychological claim. The Court stated:

In order to establish a compensable claim for traumatic neurosis under the Kansas Workers' Compensation Act, K.S.A. 44-501 *et seq.*, the claimant must establish: (a) a work-related physical injury; (b) symptoms of the traumatic neurosis; and

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<sup>7</sup> R.H. Trans. at 5.

<sup>8</sup> K.S.A. 2012 Supp. 44-501b(c).

<sup>9</sup> K.S.A. 2012 Supp. 44-508(h).

<sup>10</sup> *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, Syl. ¶ 1, 771 P.2d 557, rev. denied 245 Kan. 784 (1989).

(c) that the neurosis is directly traceable to the physical injury. Overruling *Ruse v. State*, 10 Kan. App. 2d 508, 708 P.2d 216 (1984).

**Dr. Eyman's testimony and opinions are part of the record.**

K.S.A. 2012 Supp. 44-515(e) states:

Any health care provider's opinion, whether the provider is a treating health care provider or is an examining health care provider, regarding a claimant's need for medical treatment, inability to work, prognosis, diagnosis and disability rating shall be considered and given appropriate weight by the trier of fact together with consideration of all other evidence.

K.S.A. 44-519 states:

Except in preliminary hearings conducted under K.S.A. 44-534a and amendments thereto, no report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

Respondent asserts it was surprised and prejudiced because it was not provided a rating report from Dr. Eyman prior to his deposition and under K.S.A. 2012 Supp. 44-515 and K.S.A. 44-519, his testimony and opinions concerning claimant's psychological impairment should not be considered. The Board disagrees for the following reasons:

1. K.S.A. 2012 Supp. 44-515(a), in part, provides:

The employer or the insurance carrier of the employer of any employee making claim for compensation under the workers compensation act shall be entitled to a copy of the report of any health care provider who has examined or treated the employee in regard to such claim upon written request to the employee or the employee's attorney within a reasonable amount of time after such examination or treatment, which report shall be identical to the report submitted to the employee or the employee's attorney.

Following his evaluation of claimant, Dr. Eyman only issued a report to the ALJ. He issued no other report and he generated notes from his therapy sessions with claimant. Claimant cannot produce a report which does not exist.

2. Dr. Eyman did not examine claimant at his counsel's request, but evaluated and treated claimant at the ALJ's direction. Therefore, claimant had no obligation to provide respondent a report from Dr. Eyman.

3. Respondent asserts it did not have the opportunity to review and research the basis of Dr. Eyman's permanent impairment opinion. Dr. Eyman was deposed on January 16, 2015, and respondent's terminal date was March 24, 2015. Respondent had an opportunity to depose Dr. Eyman a second time or request Dr. Eyman's deposition be continued.

4. Respondent failed to show how it was surprised or prejudiced and the two cases cited in its brief support the Board's finding on this issue. In *McVay*,<sup>11</sup> the Board found Mr. McVay inadvertently failed to provide his employer with copies of Dr. Koprivica's interrogatory answers and report. The Board also found the employer failed to show unfair surprise or prejudice, which was necessary to exclude the doctor's testimony.

In *Elam*,<sup>12</sup> Mr. Elam was examined by Dr. Rawcliffe at his employer's request. The employer received Dr. Rawcliffe's report 16 days after the examination and immediately provided it to Mr. Elam's counsel. The Board held:

Although claimant's counsel moved to quash the deposition of Dr. Rawcliffe, objected to its being taken and moved for its exclusion under K.S.A. 44-515, claimant's counsel did not seek a continuance of the deposition nor allege that additional time was needed to prepare for same. Claimant was not prejudiced nor unfairly surprised due to the one day delay in receipt of the medical report. The spirit and intent of K.S.A. 44-515 has been met and Dr. Rawcliffe's testimony is to be considered.

5. Under K.S.A. 2012 Supp. 44-515(d), Dr. Eyman's testimony is not excluded. That statute provides:

Except as provided in this section, there shall be no disqualification or privilege preventing the furnishing of reports by or the testimony of any health care provider who actually makes an examination or treats an injured employee, prior to or after an injury.

6. Respondent made no written request upon claimant's counsel for a report from Dr. Eyman as required by K.S.A. 2012 Supp. 44-515(a).

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<sup>11</sup> *McVay v. K & W Underground, Inc.*, No. 183,716, 1996 WL 385323 (Kan. WCAB June 25, 1996).

<sup>12</sup> *Elam v. Hutchinson Correctional Facility*, Nos. 179,845 & 180,405, 1996 WL 96680 (Kan. WCAB Feb. 12, 1996).

7. At the regular hearing, respondent did not indicate admissibility of Dr. Eyman's report was an issue. Although respondent objected to Dr. Eyman's testimony and opinions at his deposition, respondent filed no submission letter with the ALJ as required by K.A.R. 51-3-5. Consequently, the Award did not address respondent's objection. In *Brown*,<sup>13</sup> the Board declined to consider an issue the employer did not raise at the regular hearing or in its submission letter to the ALJ.

**Claimant sustained a permanent 12.5 percent psychological functional impairment and a work disability.**

The Board first turns its attention to respondent's contention that the psychological impairment ratings of Drs. Eyman and Jackson should not be considered because they are not in accordance with the *Guides*. Drs. Eyman and Jackson used the table at page 301 of the *Guides* setting forth the classes of impairments due to mental and behavioral disorders. They then used the *Guides to the Evaluation of Permanent Impairment* (2nd ed.) to arrive at the percentage of claimant's psychological impairment. Chapter 14 of the *Guides* does not contain percentages for psychological impairments.

Respondent asserts Dr. Eyman should have used Chapter 4 of the *Guides*, "The Nervous System," to arrive at a percentage for claimant's mild impairment for concentration. Respondent also contends Dr. Eyman erroneously used the *Guides to the Evaluation of Permanent Impairment* (2nd ed.). The Board finds this argument has little merit. Chapter 4 of the *Guides* states it is to be used to evaluate permanent impairments from dysfunction of the brain, brain stem, cranial nerves, spinal cord, nerve roots and peripheral nerves. Claimant had none of those injuries, but rather sustained a psychological injury, which should be evaluated using Chapter 14 of the *Guides*.

Respondent next contends Dr. Jackson erroneously selected a rating based upon the ranges of impairment under the *Guides to the Evaluation of Permanent Impairment* (2nd ed.). K.S.A. 2012 Supp. 44-510e(a)(2)(B), in part, states:

The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

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<sup>13</sup> *Brown v. LML Payment Systems Corporation*, Nos. 1,019,650 & 1,023,043, 2007 WL 2296127 (Kan. WCAB July 9, 2007).

In *Cerritos*,<sup>14</sup> the Kansas Court of Appeals noted, “Dr. Eyman’s use of the second edition of the AMA Guides, however, did not negate his determination that Cerritos suffered a mild impairment under the fourth edition of the AMA Guides.” The Board has determined a psychological impairment rating should not be disregarded because the *Guides to the Evaluation of Permanent Impairment* (2nd ed.) was used to determine the percentage of impairment.<sup>15</sup>

Claimant and the ALJ found fault with Dr. Caffrey’s rating opinion because he only saw claimant on one occasion on July 9, 2013, which was prior to claimant undergoing therapy with Dr. Eyman. The ALJ also found Dr. Caffrey’s rating opinion not credible because he did not review Dr. Eyman’s deposition testimony or claimant’s regular hearing testimony and his opinion was speculative. Respondent asserts the ALJ’s finding is illogical and not supported by the record.

After evaluating claimant in July 2013, Dr. Caffrey believed claimant did not need psychological treatment and was capable of engaging in substantial and gainful employment. Without seeing claimant again, Dr. Caffrey, in March 2015, opined claimant had no permanent psychological impairment. The rating opinion of Dr. Caffrey would carry more weight had he evaluated claimant again after he was treated by Dr. Eyman. A second interview with claimant and psychological testing would have added weight and substance to Dr. Caffrey’s impairment opinion.

Respondent asserts Dr. Jackson’s somatic symptom disorder diagnosis is erroneous and questions his credibility. In support of its position, respondent argues Dr. Jackson is the only psychologist to diagnose claimant with somatic symptom disorder. The fact that Dr. Jackson was the only psychologist to make that diagnosis does not make it suspect. Dr. Jackson noted claimant was diagnosed by three psychologists with adjustment disorder with depressed mood, but that it was within normal limits when he evaluated claimant.

Respondent also asserts the results of an MMPI conducted by Dr. Caffrey did not reveal symptoms of somatic symptom disorder. Dr. Caffrey, however, tested claimant in July 2013, approximately one and one-half years prior to Dr. Jackson’s evaluation. Dr. Jackson credibly explained why he diagnosed claimant with somatic symptom disorder. He also ably explained why claimant had a permanent 15 percent psychological impairment.

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<sup>14</sup> *Cerritos v. Tyson Fresh Meats*, No. 93,177, 2005 WL 1089708 (Kansas Court of Appeals unpublished opinion filed May 6, 2005), *rev. denied* Sept. 22, 2005.

<sup>15</sup> See *Ortega v. Kaw Valley Electric*, No. 1,037,644, 2011 WL 2185250 (Kan. WCAB May 13, 2011); *Harrah v. Coffeyville Regional Medical Center*, No. 1,002,341, 2009 WL 1588597 (Kan. WCAB May 26, 2009) and *Kinser v. Topeka Tree Care, Inc.*, No. 1,014,332, 2006 WL 2632002 (Kan. WCAB Aug. 2006).

The Board finds the opinions of Dr. Eyman persuasive because he was the only psychologist to both evaluate and treat claimant. The Board is cognizant of respondent's argument that Dr. Eyman, after releasing claimant, indicated claimant was in remission and had no restrictions and, therefore, sustained no permanent psychological impairment. However, Dr. Eyman explained at length, using the *Guides*, why claimant was permanently impaired. He noted claimant's injury and his inability to work as a carpenter were the prevailing factor causing claimant's psychological condition and resulting impairment.

Respondent argues claimant's psychological injury has no impact on his activities of daily living, he can function adequately and, therefore, he has no permanent psychological impairment. That argument is unpersuasive. The *Guides* defines an impairment as an alteration of a person's health status. A physician may place an injured worker in DRE Lumbosacral Category II, assign a permanent 5 percent impairment for a low back sprain, but impose no physical restrictions. Under the Kansas Workers Compensation Act, the fact the injury has no impact on the injured worker's activities of daily living does not mean he or she did not sustain a permanent functional impairment.

Moreover, claimant's psychological injury has impacted his activities of daily living. Drs. Jackson and Eyman indicated claimant was having difficulty sleeping. The *Guides*, at page 317, gives a restful sleep pattern as an example of an activity of daily living. Dr. Eyman also indicated claimant had a mild impairment for concentration and was minimizing his depression.

Claimant sustained a life-altering work injury. He enjoyed being a carpenter and enjoyed physical activities including his job as a carpenter. Dr. Schulman recognized that when he indicated claimant's self-esteem and self-confidence were affected when he could no longer perform carpentry work. Claimant's physical limitations prevent him from engaging in many activities he enjoyed before his injury. One can understand why claimant has a permanent psychological condition when he can no longer grasp coins with his right hand or use his right hand to eat.

Determining if an injured worker has a psychological injury, the diagnosis or type of psychological injury and whether he or she sustained a permanent impairment is not an easy task. Psychology, like the law, is not an exact science. The authors of the *Guides* recognized the difficulty when they stated the use of percentages implies a certainty that does not exist. The Board, like the ALJ, concludes claimant sustained a permanent psychological impairment and gives equal weight to the opinions of Drs. Eyman and Jackson. The Board finds claimant has a permanent 12.5 percent psychological impairment, which, combined with her 20 percent whole person functional impairment for

her right upper extremity injury,<sup>16</sup> results in a permanent 30 percent whole person functional impairment.

Pursuant to K.S.A. 2012 Supp. 44-510e, claimant is entitled to a work disability, because his permanent whole person functional impairment exceeds 7½ percent. Claimant has significant physical restrictions as a result of his right arm and hand injuries. He also received restrictions for his psychological injuries. Mindful of the parties' stipulations, the Board affirms the ALJ's award of a 53.35 percent work disability from November 18, 2013, through August 31, 2014, and 50 percent thereafter.

**Claimant is entitled to apply for future medical benefits.**

Under K.S.A. 2012 Supp. 44-510h(e) there is a presumption that once claimant has reached MMI, respondent's obligation to provide medical treatment ceases. Claimant can overcome the presumption with medical evidence that it is more probably true than not that additional treatment will be necessary. The Board finds claimant met his burden of proof. Dr. Zimmerman opined it was more probably true than not claimant would need additional medical treatment in the future, including the use of a nonsteroidal anti-inflammatory medication such as Celebrex or Mobic, which should be monitored by a physician. Dr. Zimmerman testified claimant might need a re-repair of the fascial defect in the right upper extremity at the site from which the hardware was removed. The Board finds that opinion is more credible than Dr. Divelbiss' opinion claimant will need no future medical treatment. Claimant sustained a very serious physical injury, has permanent hardware in his right arm and has recurring pain.

**CONCLUSION**

1. Claimant has a permanent 12.5 percent psychological impairment and a permanent 20 percent whole person physical impairment that combine for a 30 percent whole person functional impairment.

2. Claimant is entitled to a 53.35 percent work disability from November 18, 2013, through August 31, 2014, and 50 percent thereafter.

3. Claimant is entitled to apply for future medical benefits.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>17</sup> Accordingly, the findings

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<sup>16</sup> As indicated above, claimant's 34 percent right upper extremity functional impairment converts to a 20 percent whole person functional impairment.

<sup>17</sup> K.S.A. 2014 Supp. 44-555c(j).

and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, the Board modifies the April 8, 2015, Award entered by ALJ Avery by finding:

Claimant is granted compensation from respondent and its insurance carrier for an August 3, 2012, accident and resulting disability. Based upon an average weekly wage of \$800, claimant is entitled to receive the following disability benefits:

For the period from August 4, 2012, through June 12, 2013, claimant is entitled to receive 44.71 weeks of temporary total disability benefits at \$533.36 per week, or \$23,846.53.

For the period from June 13, 2013, through November 17, 2013, claimant is entitled to receive 22.57 weeks of permanent partial disability benefits at \$533.36 per week, or \$12,037.94, for an 89 percent work disability.<sup>18</sup>

For the period from November 18, 2013, through August 31, 2014, claimant is entitled to receive 41 weeks of permanent partial disability benefits at \$533.36 per week, or \$21,867.76, for a 53.35 percent work disability.

For the period commencing September 1, 2014, claimant is entitled to receive 129.08 weeks of permanent partial disability benefits at \$533.36 per week, or \$68,846.11, for a 50 percent work disability. The total award is \$126,598.34.

As of October 12, 2015, claimant is entitled to receive 44.71 weeks of temporary total disability compensation at \$533.36 per week in the sum of \$23,846.53, plus 121.71 weeks of permanent partial disability compensation at \$533.36 per week in the sum of \$64,915.25, for a total due and owing of \$88,761.78, which is ordered paid in one lump sum less any amounts previously paid.<sup>19</sup> Thereafter, the remaining balance of \$37,836.56 shall be paid at \$533.36 per week until paid or until further order of the Director.

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<sup>18</sup> Claimant did not return to work for respondent after his accident. Therefore, during this time period, claimant's wage loss was 100 percent. Averaging claimant's 100 percent wage loss with his 78 percent task loss yields an 89 percent work disability.

<sup>19</sup> As indicated above, the parties agreed respondent is entitled to a credit for overpaying claimant temporary total disability benefits in the amount of \$1,795.90. See K.S.A. 44-525(c).



Claimant is entitled to apply for future medical benefits. The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 2015.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Bruce Alan Brumley, Attorney for Claimant  
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Honorable Steven Roth, Administrative Law Judge